
Central Valley Regional Water Quality Control Board

TO: Ken Landau
Assistant Executive Officer

Alex Mayer, Staff Counsel
Office of Chief Counsel
State Water Resources Control Board

FROM: Joe Karkoski, Chief
Irrigated Lands Regulatory Program

DATE: 17 May 2012

SUBJECT: Bettencourt Trust et al. Administrative Civil Liability Complaint R5-2011-0599
Prosecution Team Response to Dischargers' Request to Rescind Complaint

This memo provides the Prosecution Team's response to the Dischargers' letter dated 5 March 2012 (as re-sent by the Dischargers on 12 April 2012), in which they requested that the Central Valley Water Board waive all violations and fines associated with Administrative Civil Liability (ACL) Complaint R5-2011-0599. The Dischargers' letter cited four reasons in support of their request. These reasons and board staff's response to each are provided below.

1. *The parties did not knowingly discharge pollutants into the waterways of Discovery Bay. F. A. Maggiore & Sons participated with the Natural Resources Conservation Service...to practice erosion control through the application of water-soluble anionic polyacrylamide (PAM) to minimize irrigation induced soil erosion as well as practice irrigation water management which involved controlling the rate, amount and timing of irrigation water to minimize soil erosion and control water loss from runoff.*

After receiving a Notice of Violation (NOV) and 13267 Order for pollution discharges during the 2010 irrigation season, the Dischargers stated that they would "attempt to reduce discharge flows, install a double sump drain system and monitor discharge flows for 'excessive turbidity.'" (See Attachment C to ACL Complaint R5-2011-0599.) Upon the request of board staff, the Dischargers further submitted a technical report dated 31 January 2011, which identified management practices to be used and provided photographic evidence of management practice use. (See Attachment E to ACL Complaint R5-2011-0599.) In their technical report, the Dischargers stated that, among other steps, irrigation return flows from the Bettencourt property "will be visually monitored for changes in turbidity at the source of irrigation water...and the discharge site at Marsh Creek Road and Hwy 4." (*Id.*) Despite these commitments, board staff continued to receive complaints of sediment-laden irrigation return flows (i.e., tail water) discharges to Discovery Bay, resulting in the 15 June 2011 inspection and observation of violations described in the inspection report. (Attachment G to ACL Complaint R5-2011-0599.)

2. *The parties were not notified of the June 15, 2011 inspection/violation by [the board] until January 20, 2012. Based on a letter dated March 4, 2011 from [the board] stating the Sediment Control Plan for the property had met NOV's requirements; and being said plan was implemented; the parties were unaware a discharge problem existed. The parties were not notified in time to reduce or eliminate the discharge; consequently the seven month delay in communication potentially increased violating discharges into the waterway and significant economic hardship to enact "Temporary Fix".*

Staff agrees that the 15 June 2011 alleged violation observed by staff was not brought to the Dischargers' attention by staff until 20 January 2012. However, the Executive Officer put the Dischargers on notice (See Attachment C to ACL Complaint R5-2011-0599) regarding the sediment discharge problems associated with their operation and the Dischargers had committed to implementing practices to address the problems, including visually monitoring their discharge. If the Dischargers had made good faith efforts to implement their own protocol, they would have been aware of the 15 June 2011 sediment discharges and taken immediate corrective actions to address those discharges. If the Dischargers were unaware of a problem in 2011, it was because they were negligent in not implementing their own plan and adequately monitoring their tail water discharges.

3. *[The board] failed to provide the parties [with] specific numerical [turbidity] data on water samples taken July 1, 2010 until January 20, 2012 (18 months).*

The Notice of Violation and 13267 Order associated with staff's 1 July 2010 investigation notified the Dischargers of discharges of sediment-laden tail water that were creating nuisance conditions in violation of the applicable Basin Plan and the Conditional Waiver. The NOV and 13267 Order included the inspection report that clearly described the turbidity problems and provided visual evidence of the impact of their discharge on downstream waters. This information was substantial enough to justify the NOV and 13267 Order and to require the Dischargers to improve their erosion and sediment control management practices. The Dischargers have failed to provide a compelling argument as to how inclusion of the turbidity data in the August 2010 NOV and 13267 would have substantially altered the Dischargers' implementation of erosion and sediment control management practices. The Dischargers response in providing a plan, clearly indicated that the Dischargers understood that they needed to address the sediment discharge and associated turbidity problems. It is important to note that the Dischargers did not indicate in their technical report a lack of understanding of the scope and severity of the problem. In any event, the Dischargers' failed to prevent a condition of nuisance in 2011 despite being informed of the problems observed in 2010.

4. *The above parties agree to seal off the natural drain discharges on the property and recirculate all water on site. This procedure or "Permanent Fix" will eliminate all future discharges.*

Board staff appreciates the Dischargers' efforts to eliminate future waste discharges. However, the penalty associated with ACL Complaint R5-2011-0599 is intended to redress past violations.

As explained in board staff's letter dated 23 March 2012, the Executive Officer finds that the additional information and issues the Dischargers have raised do not merit rescission of the ACL Complaint or reduction of the proposed ACL penalty amount.

If you have questions regarding this memo, please contact me at (916) 464-4668 or via e-mail at jkarkoski@waterboards.ca.gov.